

NEW APPLICATION



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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission
DOCKETED
SEP 30 2008

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KX NR

In the matter of:

ROBERT FRANKLIN HOCKENSMITH
JR., CRD# 1798614

Respondent.

DOCKET NO. S-20631A-08-0503

NOTICE OF OPPORTUNITY FOR HEARING
REGARDING PROPOSED ORDER TO
CEASE AND DESIST, ORDER FOR
RESTITUTION, FOR ADMINISTRATIVE
PENALTIES, OF REVOCATION AND FOR
OTHER AFFIRMATIVE ACTION

NOTICE: RESPONDENT HAS 10 DAYS TO REQUEST A HEARING

RESPONDENT HAS 30 DAYS TO FILE AN ANSWER

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") alleges that respondent ROBERT FRANKLIN HOCKENSMITH JR. has engaged in acts, practices, and transactions that constitute violations of the Securities Act of Arizona, A.R.S. § 44-1801 *et seq.* ("Securities Act").

I.

JURISDICTION

1. The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona Constitution and the Securities Act.

II.

RESPONDENT

2. ROBERT FRANKLIN HOCKENSMITH JR. ("Respondent"), CRD# 1798614, was at all pertinent times a resident of Glendale, Arizona, and a registered securities salesman affiliated with H.D. Vest Investment Services, Inc. ("H.D. Vest"), an Arizona registered securities

1 dealer, from November 5, 1999, until he was discharged on or around April 17, 2008, for allegedly
2 engaging in selling away, sale of unregistered securities, and accepting personal loans from
3 customers, relating to the transactions that are the subject of this action.

4 3. At all pertinent times, Respondent provided investment advice to H.D. Vest
5 customers through H.D. Vest Advisory Services, a non-bank subsidiary of Wells Fargo and
6 Company.

7 4. Respondent is and was at all pertinent times licensed by the Arizona Board of
8 Accountancy as a certified public accountant ("CPA"). Respondent owns a CPA firm, Robert F.
9 Hockensmith, P.C. ("RFH"), an Arizona professional corporation through which, at all pertinent
10 times, Respondent provided tax planning and preparation, accounting, and consulting services to
11 around 350 customers. Respondent is also licensed by the Arizona Department of Insurance as a
12 producer, authorized to sell variable life and annuity products and life and health policies.

13 III.

14 FACTS

15 5. At all pertinent times, Respondent held himself out to his customers as having
16 expertise in providing tax, financial planning and investment advisory services. Respondent's
17 letterhead, e-mails, and fax cover sheets listed Respondent's credentials and affiliations as follows:
18 Certified Public Accountant, Certified Financial Planner, Certified Senior Advisor, and Certified
19 Legal Document Preparer, offering securities through H.D. Vest and advisory services through
20 H.D. Vest Advisory Services.

21 A. Respondent Offered and Sold Unregistered Securities.

22 6. Beginning around August 2006, Respondent offered and sold unregistered securities
23 in the form of investment contracts and/or commodity investment contracts to customers of his
24 CPA firm, including several H.D. Vest customers. These securities involved a pooling of
25 investors' money in a foreign bank account under the name of a foreign entity controlled by a
26 ...

1 trader, who was to use the funds to purchase and sell foreign currencies on a foreign currency
2 exchange ("forex").

3 7. Beginning sometime in 2006, during tax preparation and financial planning
4 discussions with customers, Respondent mentioned that he could introduce his customers to an
5 investment opportunity that would increase customers' monthly income and also had some tax
6 advantages.

7 8. Respondent told his customers that Respondent and his family had invested large
8 amounts of their own money in these investments, and were receiving large profits. Respondent
9 showed his customers on his computer screen purported earnings from daily trades. Respondent
10 told customers that they could watch their profits grow daily on their own computer screens.

11 9. Respondent told his customers that they could withdraw their profits each month, or
12 leave them in the investment to earn more profits.

13 10. Respondent told customers that they needed cash in the amount of \$100,000.00 for
14 an initial investment, which would provide profits averaging \$4,000.00 per month.

15 11. Respondent told his customers that a highly skilled trader named James Roberts
16 ("Roberts"), through a company called FOMAC International, Inc. ("FOMAC"), had developed a
17 trading strategy that Roberts had used successfully for several years to make large profits for
18 individual investors.

19 12. Respondent told his customers that their investment funds would be pooled with
20 other investors' funds and that Roberts would have complete discretion over how to use their funds
21 to generate profits through trading foreign currencies daily.

22 13. Respondent's own observation of Roberts' trading in the FOMAC program revealed
23 monthly profits varying between 3.25% and 20.46%.

24 14. Most of Respondent's customers had no knowledge concerning foreign currency
25 trading, and invested in these securities based solely upon the information that Respondent
26 provided to them and the confidence they had in Respondent's expertise in financial matters.

1 15. Respondent did not tell his customers that the FOMAC investments were securities,
2 or that these securities were not registered with any state or federal regulatory authority.

3 16. From August 2006 through July 2007, Respondent sold FOMAC securities to
4 around 37 customers of his CPA firm. Seventeen of these customers were also customers of H.D.
5 Vest. Respondent's customers invested nearly \$8,000,000.00 in these FOMAC securities, through
6 Respondent's efforts.

7 17. Respondent gave his customers FOMAC's wiring instructions, telling them how to
8 wire their funds directly from their own bank accounts to an account in Costa Rica, for the benefit
9 of a foreign entity called Consultores Las Tres Americas S.A.

10 18. When customers questioned Respondent about the potential risks of investing in a
11 foreign currency market, Respondent explained that he also had concerns initially, until he had
12 investigated Roberts and the FOMAC program. Respondent assured his customers that he would
13 not have invested his own money in the FOMAC program if he had not personally determined that
14 the investment was secure. In fact, Respondent said that he was so confident in the success of the
15 program that he was mortgaging everything he owned, including his rental properties and his own
16 home, and was borrowing money to invest as much money as he could get hold of in the FOMAC
17 program.

18 19. Respondent distributed FOMAC's application forms to customers in Respondent's
19 own office in Glendale, Arizona. The FOMAC documents described the investment as "deposits"
20 in a "managed account program."

21 20. The FOMAC application forms included: (a) a Client Registration and Deposit
22 Form and Application for Membership;" (b) a "Letter of Intent & Non-Circumvention and Non-
23 Disclosure Agreement;" (c) "International Bank Wiring instructions for Your Bank and Your Bank
24 Account;" (d) "FOMAC Last Will and Testament;" and (e) Rules and Regulations.

25 21. The FOMAC Rules and Regulations contained the following introductory
26 statement:

1 FOMAC MANAGED ACCOUNTS has been created with a view to
2 the needs of depositors who wish to take advantage of the lucrative
3 international Foreign Currency Exchange (FOREX), heretofore
4 available only to large banks and business corporations. It will give
the small working class depositor the opportunity to take advantage of
the attractive high yields possible through FOREX trading and realize
a steady monthly income to supplement his or her regular income or
retirement income.

5 This introduction was followed by 15 statements explaining how the program worked, including
6 (1) that there would be no membership fee; (2) that the minimum initial deposit would be
7 US\$25,000.00; (3) that "Funds deposited will be utilized in the FOREX international trading
8 market and the proceeds realized will be divided 50%-50% between the Client and FOMAC
9 INTERNATIONAL;" and (4) that "Each depositor will be expected to maintain a quiet and low
10 profile regarding registration with FOMAC."

11 22. Respondent or his office staff filled out most of the information on the forms for
12 Respondent's customers, so that Respondent's customers only needed to sign the forms in
13 Respondent's office. Respondent and his office assistants even witnessed the investors' signatures
14 on the Last Will and Testament forms.

15 **B. Respondent's Fee Was 1% of the Assets in Each Client's Account Each Month.**

16 23. Respondent created a form letter to "Jim Roberts" for his customers to sign, which
17 instructed Roberts as follows: "One percent of the assets of this account are to be deposited into
18 Robert Hockensmith's account each month." After having his customers sign the letters,
19 Respondent sent the letters to Roberts with the FOMAC application forms, in most cases without
20 even giving his customers a copy of the "fee" instructions.

21 **C. Some Customers Had to Borrow the Money to Purchase the FOMAC Securities.**

22 24. Respondent told prospective investors that this deal was just too good to pass up.

23 25. Some of Respondent's customers invested their life's savings in FOMAC. Some of
24 Respondent's customers cashed out other safer investments, such as annuities, IRAs, or life
25 insurance policies, incurring withdrawal penalties or tax liabilities.

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1 26. Other customers borrowed funds to invest, incurring monthly interest payment
2 obligations on the loans, in order to receive the monthly income expected from these securities
3 investments.

4 27. Respondent recommended to at least one customer that he request an extension on
5 filing his tax returns, so that the customer could use the cash to invest in the FOMAC program and
6 pay his taxes with his profits from the investment. Within just a few months, the customer learned
7 that he had lost his investment funds, and had to borrow the money he needed to pay his taxes.

8 28. One of Respondent's customers did not have enough cash to make the initial
9 minimum purchase of the FOMAC securities, and took out a reverse mortgage on her home so that
10 she could invest. That investor is still paying the monthly interest on the reverse mortgage. She
11 lost both her investment funds and the equity in her home.

12 29. One of Respondent's long-term accounting and tax preparation customers consulted
13 Respondent for advice on how to stretch his mother's dwindling life's savings to cover her
14 expenses of continuing to live independently in her retirement home for as long as possible.
15 Respondent recommended FOMAC to this customer as a way to stretch his mother's life's savings,
16 saying that his mother would earn enough income on her FOMAC investment each month to make
17 her monthly residential lease payment. Within months after investing in FOMAC, that customer's
18 mother had lost her life's savings and was forced to move into the home of one of her children.

19 30. Respondent told one customer that the minimum investment in FOMAC was
20 \$25,000.00. That H.D. Vest customer had approximately \$25,000.00 in her IRA account.
21 Respondent told her that she could not roll over her investment from her IRA, so she cashed her
22 money out of her IRA account, incurring a large tax liability. Respondent then told the client that
23 she must have misunderstood him, and that the minimum investment in FOMAC was \$100,000.00,
24 so she borrowed additional funds from her bank. Now, that customer has lost her investment funds
25 and owes the tax liabilities from withdrawing her money from her IRA prematurely, as well as the

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1 interest on the loans to the bank. Respondent's dealer eventually learned about Respondent's
2 unauthorized involvement in FOMAC as a result of that customer's excessive bank loan debt.

3 **D. Respondent Violated Rules of His Dealers and The Commission.**

4 31. Respondent violated rules of his dealer and the Commission that prohibit engaging
5 in conduct involving "outside business activities" and "private securities transactions," by failing to
6 provide written notification to his dealer in advance of offering the FOMAC securities to his
7 customers, and failing to request and receive written authorization from his dealer before engaging
8 in such activities.

9 32. Respondent engaged in conduct prohibited by his dealer and the Securities Act by
10 effecting securities transactions that were not recorded on the records of the dealer with whom
11 Respondent was registered at the time of the transactions. This sales practice is known as "selling
12 away," and is defined under rules of the Commission as a "dishonest and unethical conduct."

13 33. Respondent borrowed \$200,000.00 from one of his H.D. Vest customers, which
14 Respondent used to purchase FOMAC securities for himself. Respondent's dealer prohibited
15 registered salesmen from borrowing funds from a customer. Rules of the Commission define
16 borrowing money from customers as "dishonest and unethical conduct."

17 34. Respondent had approximately 420 H.D. Vest investment customers before he was
18 discharged by H.D. Vest. Respondent mailed out letters to at least some H.D. Vest customers,
19 notifying them that he was no longer affiliated with H.D. Vest, but failing to tell them that H.D.
20 Vest had discharged him.

21 35. Respondent sent H.D. Vest customers forms to sign to authorize Respondent to
22 receive information from H.D. Vest about their accounts. H.D. Vest informed Respondent that he
23 could not access information about customer accounts because Respondent was not a licensed
24 investment adviser.

25 36. Respondent provided an account transfer form to at least one of his customers who
26 had purchased FOMAC securities from him. That customer signed the form, believing that she

1 was transferring her account to "the new H.D. Vest," and without knowledge that H.D. Vest had
2 discharged Respondent for unauthorized conduct involving selling FOMAC securities.
3 Respondent had the customer's account transferred from H.D. Vest to another investment adviser
4 firm, which had moved into the same office where Respondent had provided the customer services
5 under H.D. Vest, and where Respondent continues to operate his CPA firm.

6 **E. Respondent Misled His Customers About the Risks of the FOMAC Investment.**

7 37. In describing the FOMAC program to his customers, Respondent represented that
8 he had personally investigated the investment and determined that it was safe and profitable.

9 38. Respondent misled his customers about the extent of Respondent's own knowledge
10 relating to the FOMAC securities, and about his own expertise in evaluating the risks of the
11 investment.

12 39. Respondent provided his customers no written disclosure concerning the
13 background or track record of the investment or its principals, but gave only verbal assurances that
14 the program was successful.

15 40. Respondent provided his customers no written disclosure concerning the financial
16 condition of FOMAC or Roberts before recommending the investment to his customers.

17 41. Respondent himself had no financial information concerning the investment
18 program, other than the fact that he and other investors had received purported returns from their
19 investments in FOMAC, and the FOMAC computer print-outs that reflected purported earnings.

20 42. Respondent relied solely upon the FOMAC computer print-outs and verbal
21 statements made by Roberts concerning the safety and success of the FOMAC investment program.

22 43. Although Respondent may have conversed with Roberts on the phone before
23 recommending the securities to his customers, Respondent did not actually meet with Roberts until
24 April 2007, after having sold the securities to many of his customers.

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1 44. Hoping to learn more about this complicated type of investment after Respondent
2 had already recommended and sold FOMAC securities to many of his customers, Respondent
3 attended a two-day presentation for investors on market trading strategies, held in Los Angeles.
4 Respondent was apparently reassured about the FOMAC program when the speaker purportedly
5 mentioned Roberts a few times during the presentation.

6 45. Respondent misled his customers with reassuring statements that minimized the
7 risks of the FOMAC investment, including one or more of the following:

- 8 a. That he had studied Roberts' program for two years before he had invested.
- 9 b. That the FOMAC program had consistently produced monthly profits for
10 investors.
- 11 c. That he had thoroughly investigated the program and determined that it was
12 sound or secure.
- 13 d. That he had spent a significant amount of his own money to investigate Roberts
14 and the FOMAC program.
- 15 e. That he would not have invested if he was not personally assured that the
16 investment was safe or secure.
- 17 f. That he personally knew Roberts, and vouched for his honesty.
- 18 g. That he had not recommended FOMAC to his customers until he had fully
19 investigated the program and personally tested the soundness of the program.
- 20 h. That the investment was not a Ponzi scheme, because Ponzi schemes can only
21 survive for six months before they collapse.

22 46. Some of Respondent's customers understood from their discussions with
23 Respondent that he personally was going to monitor their investments and participate in the
24 oversight and operation of the FOMAC program.

25 47. In or around July 2007, Respondent e-mailed announcements to FOMAC
26 "Members," many of whom he did not know, introducing himself as follows:

1 I AM A CPA, CFP, MBA, AND HAVE A LEGAL STUDIES DEGREE TOO. I
2 HOLD SECURITIES LICENSES 6 & 63, AND INSURANCE LICENCES AS
3 WELL. I HAVE MY OWN A (sic) LEGAL SERVICES, TAX, ACCOUNTING,
4 AND SECURITIES FIRM IN PHOENIX, AZ, & LAS VEGAS, AND I AM A
5 FELLOW MEMBER IN FOMAC.

6 Respondent informed FOMAC Members that he was taking over administration of the FOMAC
7 program "to better allow [Roberts] to trade more often, with less interruption."

8 48. In or around June or July 2007, FOMAC failed to pay Respondent monthly profits
9 reflected on Respondent's FOMAC computer print-outs. Respondent purportedly became
10 concerned because Roberts failed to respond to Respondent's telephone calls and emails.

11 49. In late July and early August 2007, Respondent telephoned and emailed his
12 FOMAC customers and scheduled meetings with many of them in his office. Respondent told his
13 customers that FOMAC was a fraud, and that they had all lost their money. Respondent told his
14 customers not to feel too bad because Respondent had lost a lot more than they did. Respondent
15 told his customers that Respondent had reported the fraud to the FBI, and that they could contact
16 the FBI to report their losses.

17 50. In or around late August and September 2007, the US Department of Justice Victim
18 Notification System sent FOMAC investors emails, alerting them that on August 31, 2007, the
19 Securities and Exchange Commission ("SEC") had filed a Temporary Restraining Order ("TRO")
20 against Roberts, d/b/a FOMAC and Consultores Las Tres Americas, in the U.S. District Court in
21 Little Rock, Arkansas, to halt the alleged ongoing Ponzi scheme and freeze assets for the benefit of
22 defrauded investors. The SEC's complaint in *SEC v. James B. Roberts, FOMAC International,*
23 *Inc., and Consultores Las Tres Americas S.A.*, Civil Action No. 4.07.CV.786 (JLH)(U.S.D.C./E.D.
24 Ark. August 31, 2007), alleged that the defendants raised at least \$50 million since 2002 from
25 approximately 450 investors located primarily in the U.S. and Costa Rica; and that as early as
26 2005, the defendants experienced significant losses while trading investor funds in the Forex
markets, misappropriated at least \$3 million, and then used new investor money to pay returns and
principal to existing investors.

...

51. On or about May 20, 2008, the U.S. Department of Justice Victim Notification System of the FBI in Little Rock, Arkansas, notified FOMAC investors that “on May 27, 2008, James B. Roberts, doing business as FOMAC international, Inc. and Consultores Las Tres Americas, SA, entered a plea of guilty to a one count information charging him with Wire Fraud” under the United States Criminal Code.

IV.

VIOLATION OF A.R.S. § 44-1841

(Offer or Sale of Unregistered Securities)

52. From on or about August 2006 through July 2007, Respondent offered or sold securities in the form of investment contracts and/or commodity investment contracts, within or from Arizona.

53. The securities referred to above were not registered pursuant to Articles 6 or 7 of the Securities Act.

54. This conduct violates A.R.S. § 44-1841.

V.

VIOLATION OF A.R.S. § 44-1991

(Fraud in Connection with the Offer or Sale of Securities)

55. In connection with the offer or sale of securities within or from Arizona, Respondent directly or indirectly: (i) employed a device, scheme, or artifice to defraud; (ii) made untrue statements of material fact or omitted to state material facts that were necessary in order to make the statements made not misleading in light of the circumstances under which they were made; or (iii) engaged in transactions, practices, or courses of business that operated or would operate as a fraud or deceit upon offerees and investors. Respondent's conduct includes, but is not limited to, the following:

a. Misrepresenting Respondent's own personal knowledge, experience, and training relating to forex securities or forex trading;

- b. Misrepresenting the safety of the FOMAC investment program;
- c. Misrepresenting the extent of Respondent's investigation of the FOMAC investment program and the trustworthiness of the promoters;
- d. Failing to disclose Respondent's lack of experience or expertise in evaluating the specific risks related to this type of securities investments;
- e. Failing to disclose that the securities were unregistered;
- f. Failing to disclose specific risks related to the purchase of these securities, including the fact that the foreign currency market was unregulated and the trader was not registered to sell securities; and
- g. Failing to disclose that Respondent sold the securities without providing the required written notice or receiving the required authorization from his dealers.

56. This conduct violates A.R.S. § 44-1991.

VI.

REMEDIES PURSUANT TO A.R.S. § 44-1962

(Denial, Revocation, or Suspension of Registration of Salesman; Restitution, Penalties, or other Affirmative Action)

57. Respondent's conduct is grounds to revoke Respondent's registration as a securities salesman with the Commission pursuant to A.R.S. §§ 44-1962(A)(2) and (10). Specifically, Respondent has:

- a. Violated §§ 44-1841 and 44-1991 of the Securities Act within the meaning of A.R.S. § 44-1962(A)(2), by offering and selling unregistered securities and misrepresenting and failing to disclose material facts in connection with the sale of those securities.
- b. Engaged in dishonest or unethical practices within the meaning of A.R.S. § 44-1962(A)(10) as defined by A.A.C. R14-4-130(A)(15), by borrowing money from a customer that was not a relative of the salesman or a person in the business of lending funds.

1 c. Engaged in dishonest or unethical practices within the meaning of A.R.S. § 44-
2 1962(A)(10) as defined by A.A.C. R14-4-130(A)(17), by effecting securities
3 transactions that were not recorded on the records of the dealer with whom he was
4 registered at the time of the transactions.

5 58. Respondent's conduct is grounds to assess restitution, penalties and/or take
6 appropriate affirmative action pursuant to A.R.S. § 44-1962. Specifically, Respondent has engaged
7 in dishonest or unethical practices within the meaning of A.R.S. § 44-1962(A)(10) as defined by
8 A.A.C. R14-4-130(A)(15) and (17).

9 **VII.**

10 **REQUESTED RELIEF**

11 The Division requests that the Commission grant the following relief:

12 1. Order Respondent to permanently cease and desist from violating the Securities Act,
13 pursuant to A.R.S. §§ 44-2032 and 44-1962;

14 2. Order Respondent to take affirmative action to correct the conditions resulting from
15 Respondent's acts, practices, or transactions, including a requirement to make restitution pursuant to
16 A.R.S. § 44-2032 and 44-1962;

17 3. Order Respondent to pay the state of Arizona administrative penalties of up to five
18 thousand dollars (\$5,000) for each violation of the Securities Act, pursuant to A.R.S. § 44-2036;

19 4. Order Respondent to pay the state of Arizona administrative penalties, pursuant to
20 A.R.S. § 44-1962;

21 5. Order the revocation of Respondent's registration as a securities salesman pursuant
22 to A.R.S. § 44-1962;

23 6. Order any other relief that the Commission deems appropriate.

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VIII.

HEARING OPPORTUNITY

Respondent may request a hearing pursuant to A.R.S. §§ 44-1972 and A.A.C. R14-4-306. **If Respondent requests a hearing, Respondent must also answer this Notice.** A request for hearing must be in writing and received by the Commission within 10 business days after service of this Notice of Opportunity for Hearing. Respondent must deliver or mail the request to Docket Control, Arizona Corporation Commission, 1200 W. Washington, Phoenix, Arizona 85007. Filing instructions may be obtained from Docket Control by calling (602) 542-3477 or on the Commission's Internet web site at <http://www.azcc.gov/divisions/hearings/docket.asp>.

If a request for a hearing is timely made, the Commission shall schedule the hearing to begin 20 to 60 days from the receipt of the request unless otherwise provided by law, stipulated by the parties, or ordered by the Commission. If a request for a hearing is not timely made the Commission may, without a hearing, enter an order granting the relief requested by the Division in this Notice of Opportunity for Hearing.

Persons with a disability may request a reasonable accommodation such as a sign language interpreter, as well as request this document in an alternative format, by contacting Linda Hogan, ADA Coordinator, voice phone number 602/542-3931, e-mail lhogan@azcc.gov. Requests should be made as early as possible to allow time to arrange the accommodation.

IX.

ANSWER REQUIREMENT

Pursuant to A.A.C. R14-4-305, if Respondent requests a hearing, Respondent must deliver or mail an Answer to this Notice of Opportunity for Hearing to Docket Control, Arizona Corporation Commission, 1200 W. Washington, Phoenix, Arizona 85007, within 30 calendar days after the date of service of this Notice. Filing instructions may be obtained from Docket Control by calling (602) 542-3477 or on the Commission's Internet web site at <http://www.azcc.gov/divisions/hearings/docket.asp>.


Additionally, Respondent must serve the Answer upon the Division. Pursuant to A.A.C. R14-4-303, service upon the Division may be made by mailing or by hand-delivering a copy of the Answer to the Division at 1300 West Washington, 3rd Floor, Phoenix, Arizona, 85007, addressed to Pam Johnson, the attorney of record.

The Answer shall contain an admission or denial of each allegation in this Notice and the original signature of Respondent or Respondent's attorney. A statement of a lack of sufficient knowledge or information shall be considered a denial of an allegation. An allegation not denied shall be considered admitted.

When Respondent intends in good faith to deny only a part or a qualification of an allegation, Respondent shall specify that part or qualification of the allegation and shall admit the remainder. Respondent waives any affirmative defense not raised in the Answer.

The officer presiding over the hearing may grant relief from the requirement to file an Answer for good cause shown.

Dated this 30 day of September, 2008.


Matthew J. Neubert
Director of Securities